observations on proceedings before the board. In my opinion, evidence should first be led in support of a charge before an architect is called upon for his explanation. Much as I regret having to say so, this was not done in the present case and there is some ground for the complaint made on behalf of the appellant that methods, smacking of the inquisitorial procedures adopted in bygone days and still adopted today in less fortunate countries, were followed. To deprive a man of his right to profess his chosen career is a serious matter. Though there may have been some ground for righteous indignation on the part of his official colleagues who were there to make due inquiry into his conduct they could, in my view, have first called evidence proving the charge against him. I have to say with regret that they appear to have proceeded on the basis that he was guilty and had to prove his innocence.

The only evidence against him was that of a letter written to him by a convicted cheat and an agreement in writing in English in which he is alleged to have agreed to sign plans prepared by that cheat. There was no direct evidence of his ever having so signed a single plan. He was asked to explain his conduct in so signing plans when there was no evidence of this apart from the agreement which merely proved an intent to do so. If this was infamous conduct in a professional respect then it was for the board to say so in unmistakable terms. This they have not done. They have merely charged him with breach of an invalid by-law and with signing plans prepared by someone else without proof thereof. He may have been guilty of conspiring to sign such plans with the convicted cheat. If this was infamous conduct he should have been charged accordingly. He was not.

The appeal therefore succeeds with costs.

I might add that Brown J. also decided in the case cited that the correct procedure for an appeal to the High Court is by way of originating motion as was done in this case.

Appeal allowed.

Solicitors: *Chor Pee & Hin Hiong; Rodyk & Davidson.*

LIAW v. BLIKAS

[O.C.J. (Lee Hun Hoe J.C.) January 9, 1965]

[Sibu — Civil Suit No. 23 of 1964]

Probate and Administration — Grant of probate and letters of administration by probate officer — Application for revocation of grant — Procedure — Power of probate officer to revoke grant — Administration of Estates Ordinance (Sarawak Cap. 80 of 1948 Revised Edn.), ss 9 and 32.

Native Law and Custom — Dayak customary law — Lanting — Application of Laws Ordinance.

This was an application for the revocation of letters of administration granted to the defendant. The probate officer had granted letters of administration to the defendant as it appeared that defendant looked after the deceased's bilek and was solely responsible for the funeral feasts.

Held: (1) there would appear to be no provision for challenging the decision of the probate officer by way of appeal to the courts and the plaintiff should have applied to the probate officer to revoke the grant;

(2) in any case the plaintiff had failed to establish that the probate officer had granted the letters of administration to the wrong person in this case, as on the evidence the defendant had shown that she was entitled to the property according to Dayak customary law.

Cases referred to:—

(1) *Foo Sam Tek* v. *Probate Officer, Simanggang* [1960] S.C.R. 17, 18.

(2) *Re Chew Siew Khim* [1964] M.L.J. 412.

(3) *Li Khoi Chin* v. *Su Ah Poh* [1950] S.C.R. 17.

(4) *Chan Bee Neo & Ors.* v. *Ee Siok Choo* [1947] S.C.R. 1.

(5) *Sat anak Akum & Anor.* v. *Randong anak Charareng* [1958] S.C.R. 104.

CIVIL SUIT.

George Seah for the plaintiff.

Defendant in person.

Cur. Adv. Vult.

Lee Hun Hoe J.C.: Originally plaintiff prayed for (a) the revocation of the letters of administration granted to defendant, (b) a declaration that plaintiff should be entitled to that parcel of land described as J.O.T. No. 1625 of about 1.25 acres, and (c) an order that plaintiff should be granted letters of administration. At the hearing Mr. Seah for plaintiff informed the court that he was abandoning (b) and (c). So the only matter for the court to decide is (a).

Deceased, Liat anak Belayong died some years ago at Rumah Jana, Sarikei. He had three sons and three daughters. Ganing is the eldest son. Plaintiff is the 2nd son and Gayai the youngest son. The three daughters are called Jaliah, Isi and Amih. As soon as his children were married they lived separately from deceased. Jaliah is now dead. She had a son, Adau who married defendant. Adau had passed away. Since her marriage defendant had been in deceased's "bilek" (room i.e. the family household unit) and still remains there. On 22nd November, 1963 at the request of Ganing and with the agreement of Tuai Rumah Jana the probate officer, Sarikei, granted letters of administration to defendant because it was represented to the probate officer that defendant looked after deceased's "bilek" and was solely responsible for the "perantu" (the last feast for the dead).

In Sarawak it seems the grant of probate and letters of administration is in the hands of the administration and there does not appear to be any provision for challenging the decision

of the probate officer by way of appeal to the courts. It is not clear to me how an administration action may be brought before the courts in Sarawak. It seems to me that by asking the court to revoke the grant of letters of administration plaintiff is in effect challenging the decision of the probate officer. It is therefore questionable whether this is the proper procedure for doing so. Further it is questionable whether defendant should have been made a party since the action has nothing to do with defendant's duty as an administratrix. In *Foo Sam Tek* v. *Probate Officer, Simanggang* [1] and *Re Chew Siew Khim* [2] the decision of the probate officers were challenged by way of *certiorari* and mandamus. Procedural difficulty is clearly expounded in the former case when Ainley C.J. said:—

"There is no doubt that the probate officer had jurisdiction to pass over the appellant if in his opinion the appellant was unfit to act. He had discretion in the matter which of course he was bound to exercise in a just and proper manner. The appellant however says that the probate officer has shown, by his order, that he was not acting in a proper manner. His difficulty has been to find an effective method of challenging the probate officer's decision in the courts, and here I have sympathy with him. It is a peculiarity of our law that the grant of probate and administration is not in the hands of officers of the court, but has been placed in the hands of officers from whose decision no channel of appeal is apparently available. Indeed I find it difficult to understand how an administration action could properly be brought before the courts of this country. However the appellant faced with these difficulties, adopted the expedient of instituting proceedings by way of *certiorari* and mandamus, and he followed the English procedure as he was entitled to do by virtue of section 24(6) and (7) of the Crown Proceedings Ordinance. In short he applied to the High Court for leave to apply for the orders sought. The learned judge dismissed the application and without seeking leave to appeal the appellant appealed to this court. His authority for doing so lies in the English practice, and I have no quarrel with the appellant on this ground."

The defendant was not represented by counsel and I therefore have no opportunity of hearing legal argument on points of law from her. Mr. Seah for the plaintiff submitted that the procedure he adopted is correct and that the court may revoke such grant. He referred me to paragraph (f) of section 24 of the Courts of Judicature Act, 1964 and cited the case of *Li Khoi Chin alias Li Chi Nyon* v. *Su Ah Poh.* [3] In that case letters of administration were granted to defendant who was unable to prove her marriage to deceased and also defendant did not fall within those categories of person mentioned in section 8 of the Administration of Estates Ordinance. The court set aside the letters of administration and directed that the estate should vest in and be administered by the Bau probate officer. There the court did not raise the question of procedure. Also in that case the parties were Chinese and the court was not concerned with the question of native law and custom.

I think the procedure adopted is highly irregular as there is no clear indorsement on the writ to indicate the nature of the action. In my view the irregularity is not curable under Order 70 rule 1 and the plaintiff's claim should be dismissed.

However I have decided to hear the parties as my view on the question of procedure may be wrong. Mr. Seah argued that the probate officer granted the letters of administration to the wrong person. He contended that the grant to the defendant was not according to law. In my opinion "according to law" means the law recognised by the courts. By virtue of section 2 of the Application of Laws Ordinance Dayak customary law is recognised and in force in Sarawak. I find support in the case of *Chan Bee Neo & Others* v. *Ee Siok Choo.* [4] In the course of his judgment Hedges C.J. stated at page 3:—

"The effect of the Law of Sarawak Ordinance is that the law of England, in so far as it is not modified by Sarawak Ordinance, and in so far as it is applicable to Sarawak 'having regard to native customs and local conditions', is the law of Sarawak. The Supreme Court has interpreted this Ordinance, if not expressly at all events by implication, as meaning that native law and custom will be respected and in a proper case must be applied. But 'native custom' means the custom of natives of Sarawak, and the natives of Sarawak must belong to one of the races considered indigenous to the Colony and enumerated in the Schedule to the Interpretation Ordinance. The Chinese are not indigenous to this country and Chinese customary law is not 'native custom'."

The Law of Sarawak Ordinance was repealed by the Application of Laws Ordinance. The fact that Sarawak is now part of Malaysia has not in any way altered the native law and custom.

Tuai Rumah Jana (D.W.2) gave evidence for the defendant. He said some four years ago a "perantu" was held in connection with the death of deceased. Dayaks from some 13 (thirteen) longhouses were invited to the feast which involved the killing of many pigs and fowls and possibly the supply of "tuak" (Dayak rice wine). Therefore, the holding of a "perantu" meant someone had to foot the heavy bill. In this case defendant did so. According to D.W.2 a "perantu" is only held when a deceased Dayak had left "lanting", that is property reserved for the purpose. During the "perantu" D.W.2 and other Tuai Rumahs present apparently considered that parcel of land described as J.O.T. No. 1625 to be "lanting" and decided that it should be given to defendant. The reason was that defendant looked after deceased and his "bilek" and was also solely responsible for the "perantu". D.W.2 testified that all the children of deceased including plaintiff agreed that the said property should go to defendant. Consequently Ganing, deceased's eldest son, and D.W.2 and defendant approached the probate officer and defendant was granted

letters of administration.

"Lanting" does not necessarily go to the heir. For authority I would refer to the case of *Sat anak Akum and Another* v. *Randong anak Charareng* (5) where Lascelles J. delivered the main judgment of the Court of Appeal said at page 110:—

"It has been long established custom among the Dayaks that a person may set aside certain property as *lanting* to go to someone — not necessarily an heir — who has looked after him in his old age and who will be responsible for his funeral. However this is only if the heirs agree; in this present case the heirs certainly do not agree."

Plaintiff said he had never agreed to the property going to defendant. He said he had contributed to the "perantu". On the other hand defendant said plaintiff had agreed and all his brothers and sisters also agreed to her having the property. Tuai Rumah Jana (D.W.2) corroborated defendant substantially. None of the other children of deceased was called by either party to give evidence on this matter. It is also significant that none of the deceased's children, except plaintiff, come forward to claim the property.

Plaintiff did not impress me as a sincere and truthful witness. On the other hand both defendant and Tuai Rumah Jana (D.W.2) convinced me that they were telling the truth. In particular, I am very much impressed with the manner D.W.2 gave evidence. He was cross-examined at some length but was not shaken in any way. He certainly knew what he was talking about regarding their various customs. Accordingly I would regard him as an expert.

Mr. Seah said he would only confine himself to the question of law and would call evidence on that issue. However I consider that defendant should not be prevented from establishing her right under the Dayak customary law in view of plaintiff's pleading which has not been amended in any way. I hold that on the evidence she has satisfied me that she is entitled to the property according to the Dayak customary law.

It would appear that next to Ganing plaintiff stood next amongst the male heirs entitled to grant under section 8 of the Administration of Estates Ordinance. Ganing did not exercise his right to obtain the grant because apparently he considered defendant had the right under their custom to the property. Under section 9(1) of the said Ordinance a probate officer has a very wide discretion to grant probate or letters of administration to any suitable person who may be willing to act if he considered the person entitled to act under section 8 is unfit to act. Section 9(1) reads:—

"If, in the opinion of the probate officer, the person or persons entitled to probate or letters of administration is or are unfit to act, he may issue the grant to the person or persons next entitled, or to any suitable person or persons who may be willing to act.'

The expression "unfit to act" is very wide indeed. I can only assume that the probate officer must have decided that the children of the deceased had renounced their rights in favour of defendant who appears to be deceased's nearest female relative and therefore they were "unfit to act". I would suggest that if persons who have prior rights to the grant renounced their rights then a probate officer should endeavour to get those persons to put their renunciations in writing. The probate officer was also the district officer of Sarikei. As an administrative officer he knew or should know more about native customary law than other civil servants. I do not think he would pass over the children of the deceased and grant the letters of administration to defendant without any good reason. Extracts from the proceedings before the grant was made show that Ganing, the eldest son of deceased requested that defendant be granted letters of administration because she looked after deceased's "bilek" and was also responsible for the "perantu". Tuai Rumah Jana (D.W.2) agreed with the request. A Tuai Rumah Jana is the head of a longhouse and is a respected authority in that longhouse. The extracts also confirmed that defendant looked after deceased's "bilek" and was responsible for the "perantu". I hold that plaintiff has not shown me that the probate officer was acting in any way in an unjust or improper manner under the circumstances or that he was acting without jurisdiction. On the evidence I hold that plaintiff has failed to establish that the probate officer had granted the letters of administration to the wrong person.

Another reason why I refuse to make the order prayed for is because plaintiff has not exhausted the remedy provided under the Administration of Estates Ordinance. Under section 32 of the said Ordinance a probate officer has been given a discretion to revoke his grant of probate or letters of administration at any time on good cause being shown. In my opinion plaintiff should only come to this court as a last resort, at least, until he has exhausted that remedy provided by the said Ordinance.

For reasons given plaintiff's claim is dismissed with costs to defendant. I assess costs at $120.

Claim dismissed.

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